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Regulatory Takings—Winds of Change Blow along the South Carolina Coast: *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992)

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Note

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I. INTRODUCTION

In *Lucas v. South Carolina Coastal Council*,[1] the United States Supreme Court, in an opinion authored by Justice Scalia, held that "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[2] After years of struggling with the issue, the Court has taken an initial step that may shift the balance between public regulation and private property rights in favor of the landowner.[3]

1. 112 S. Ct. 2886 (1992).
2. *Id.* at 2895.
3. The Fifth Amendment's guarantee that "private property [shall not] be taken for public use without just compensation" has always been the source of much conflict. Property owners believe they should be able to use their land in any manner that they desire without physical or regulatory interference. Government, however, sometimes decides that the use a landowner has in mind is not in the

This Note will examine the impact that *Lucas* could have on the struggle between public and private rights. First, the Note will present the events leading up to the Supreme Court's consideration of *Lucas*, including an examination of the three cases during the past decade presaging this victory for private property rights. Second, the Note will examine the majority's emphasis on a public nuisance consideration in takings cases. Finally, this Note will consider how the Court's new per se takings rule, which requires compensation when a regulation denies a property owner all economically beneficial use of his property, will affect takings jurisprudence.

II. BACKGROUND

A. The Facts in *Lucas*

In 1986, David Lucas purchased two lots on a South Carolina barrier island for $975,000. He intended to build single-family homes on those lots, similar to the homes on neighboring lots. Lucas planned to live in one of the new homes and sell the other. At the time he purchased the property, Lucas's lots were not affected by any of South Carolina's coastal zone building permit regulations.

In 1988, however, the South Carolina Legislature enacted a Beachfront Management Act,[4] which prohibited Lucas from building any permanent structures, with the exception of a small walkway,[5] on his lots. Lucas filed suit and contended that, although the Act may have been within the state's police power,[6] it deprived him of all economi-

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best interest of the landowner's neighbors or the community in general. When these two sides disagree—when a landowner says "yes" and the government says "no"—controversy arises concerning just how far the government can go without infringing on the property owner's Fifth Amendment rights.

Such controversies generally involve one of two types of interference: physical occupation or regulations that restrict the use of property. In cases of physical occupation, the courts have consistently found that a taking has occurred and have ordered that the landowner be compensated. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). When regulatory takings are at issue, however, the courts generally have not been as willing to find that a taking has occurred. *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

During the past decade, however, the courts have relaxed their harsh stance against finding that oppressive regulations are takings and have given some leverage to private landowners. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1980)(Brennan, J. dissenting). And in *Lucas*, the Supreme Court announced a new categorical rule that regulations that deprive a landowner of all economically viable use of his property constitute a per se taking. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

4. 1988 Act No. 634, 1988 S.C. Acts 5130 (current version at S.C. CODE ANN. §§ 48-39-250 to -360 (Supp. 1992)).
5. S.C. CODE ANN. § 48-39-130 (1987).
6. Police power is generally defined as the power of a state to regulate private prop-

cally viable use of his property and was, therefore, a taking.[7]

A state trial court held that the regulation left Lucas's property valueless and awarded Lucas $1.2 million in compensation for the taking.[8] The South Carolina Supreme Court reversed, and held that because Lucas had conceded the Act's validity the court was bound to accept the Legislature's position that construction along the coastal zone would harm a public resource.[9] In holding there was no taking, the court relied on the harmful or noxious use test developed by the United States Supreme Court in cases such as *Mugler v. Kansas*.[10] In *Mugler*, the Court held that there was no compensation due under the Takings Clause[11] when a regulation prevented a public harm.[12]

After the case was argued in the South Carolina Supreme Court, but before a decision was rendered, the South Carolina Legislature amended the Act, allowing property owners such as Lucas to apply for a permit that would enable him to build on his lots.[13] The South Carolina Supreme Court, however, decided the case without first requiring Lucas to apply for a permit to determine whether the dispute could be resolved extrajudicially.[14]

The United States Supreme Court granted certiorari and, in a 6-3 decision, reversed the South Carolina Supreme Court, finding that the South Carolina Supreme Court's application of the harmful or noxious use doctrine was misplaced.[15] The Court, in rejecting the doctrine's

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erty in ways substantially related to promoting public health, safety, morals and general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *See also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)("The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests.").

7. A "taking" has been defined as "constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967).
8. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991)(reporting trial court decision), *rev'd*, 112 S. Ct. 2886 (1992).
9. 404 S.E.2d 895, 898 (S.C. 1991).
10. *Id.* at 899-902 (citing Mugler v. Kansas, 123 U.S. 623 (1887)).
11. The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The Fifth Amendment is made applicable to states through the Fourteenth Amendment. Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 242 (1897).
12. The harmful or noxious use test used by the early Court allowed government, through regulation, to prohibit a landowner from using his land in ways that were deemed harmful to the community or public in general. *See also* Hadacheck v. Sebastian, 239 U.S. 394 (1915)(upholding a regulation that prohibited a brickyard from continuing operation in a residential area).
13. S.C. CODE ANN. §§ 48-39-290(A)(6), -290(D)(1)(Supp. 1992).
14. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 902 n.8 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).
15. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2898-99 (1992).

application, stated that it was nearly impossible to distinguish a regulation that prevents a harmful use from one that confers benefits.[16] The test, therefore, was essentially useless. The Court chose instead to base its decision on common law principles of nuisance and property law.[17] It remanded the case to the South Carolina Supreme Court to determine whether Lucas's intended use of the beachfront lots was in conflict with South Carolina's property laws or nuisance principles.[18]

B. Forerunners of *Lucas*

Commentators have suggested that the Supreme Court has in the modern era favored community control of property at the expense of individual control and private property rights, at least where regulation is concerned.[19] Beginning with its consideration of *San Diego Gas & Electric Co. v. City of San Diego*,[20] however, the Court began to pave the way for allowing individual landowners leverage in the battle between public and private rights. Although the majority declined to review the lower court's decision because it was not ripe for review,[21] a strong dissent, authored by Justice Brennan and joined by Justices Stewart, Marshall and Powell, suggested that when a regulation works a taking, the landowner should be compensated.[22] With four justices clearly in favor of compensation for regulatory takings, it seemed plausible that sometime soon that view might gain a majority.

Six years later, the Court rendered two decisions that began the shift toward more private property rights.[23] In *Nollan v. California Coastal Commission*,[24] the Court held that the Commission could not condition a building permit on an owner's agreement to grant an easement across beachfront property without paying compensation.[25] The Court recognized the similarity between physical occupation and regulatory takings:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that [the regulation] does not constitute a taking of a

16. *Id.*
17. *Id.* at 2901.
18. *Id.* at 2901-02.
19. Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1936 (1992). *See also* Nebbia v. New York, 291 U.S. 502, 511 (1934).
20. 450 U.S. 621 (1980).
21. *Id.* at 633.
22. *Id.* at 636-61 (Brennan, J., dissenting).
23. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).
24. 483 U.S. 825 (1987).
25. *Id.* at 841-42.

> property interest but rather [is] . . . "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning.[26]

In *First English Evangelical Lutheran Church v. County of Los Angeles*,[27] the Court held that the government must compensate a landowner for a temporary taking when a regulation deprives the landowner of all beneficial use of his property.[28] The Court in *First English* stated that the Takings Clause does not require eminent domain proceedings and physical occupation to effect a taking. "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."[29] These three cases were the first signs of potential winds of change concerning regulatory takings. It seemed clear that the Court was ready to closely scrutinize regulations in determining whether a taking was involved.

III. ANALYSIS

A. A New Per Se Takings Rule

Perhaps the most significant step toward bolstering private property rights was the *Lucas* Court majority's conclusion that denial of all economically beneficial or productive use of land should be added to the list of per se takings that do not have to be decided on the basis of fact-specific inquiries.[30] While the Court has consistently held that physical occupation, no matter how slight, constitutes a taking,[31] it had been reluctant to extend the same protection to regulatory takings.[32]

In adding deprivation of all economically beneficial or productive use to its list of per se takings, the Court has indicated a willingness to treat oppressive regulations that deny a landowner use of his land in the same manner as situations in which the government physically occupies the property. To do otherwise is an injustice to property own-

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26. *Id.* at 831 (citations omitted).
27. 482 U.S. 304 (1987).
28. *Id.* at 318-19.
29. *Id.* at 316.
30. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). The Court has consistently held that a physical occupation, no matter how slight, constitutes a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In non-physical occupation cases, however, the Court has generally engaged in ad hoc factual inquiries into the circumstances of each particular case. The three factors primarily considered are: (1) The economic impact of the regulation; (2) the extent to which the regulation interfered with investment-backed expectations; and (3) the character of the governmental action. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).
31. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
32. Penn Central Transp. Co. v. City of New York, 438 U.S. 419 (1982).

ers. Regulations that forbid property owners from using their land in certain ways place the same amount of hardship on those landowners as physical occupations.

In *Lucas*, for example, suppose the Coastal Council had decided that Lucas's lots were an ideal location for an observation station from which to monitor the effects of erosion along the coastline. Had the Council physically taken possession of the property to conduct its research, there is no doubt that a court would have found a taking.[33] By virtue of the Council occupying his land, Lucas would have been unable to use the property to build single-family residences. How does this differ from what actually happened to Lucas?

In the actual case the state government, in the form of a regulation, denied Lucas the right to use his property in the manner in which he chose. In deciding whether there was a taking, it should make no difference that the Council was not physically present on the property. It was, in a very real sense, "present" in the form of this regulation. In denying a landowner the use of his land, the government essentially ousts him from that property, and he should be compensated just as he would be in a physical occupation case.[34]

Justice Holmes recognized that the hardship from regulation is just as onerous as physical occupation when he stated in *Pennsylvania Coal Co. v. Mahon*[35] that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[36] Although Justice Holmes did not define how far is "too far," he realized that the legislature's power to regulate must be kept in check. Allowed to regulate with no restraint, the legislature would succumb to "the natural tendency of human nature . . . to extend the qualification more and more until at last private property disappears."[37]

This is apparently what happened in a line of cases in which government regulation of wetlands areas directly confronted private property rights.[38] In several decisions the Court wrested control of property away from private landowners and gave the government

33. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); United States v. Causby, 328 U.S. 256 (1946); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922).

34. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316-17 (1987).

35. 260 U.S. 393 (1922).

36. *Id.* at 415.

37. *Id.*

38. *See* Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287 (N.H. 1984); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963). *But see* Bartlett v. Zoning Comm'n of Old Lyme, 282 A.2d 907 (Conn. 1971)(holding that regulations restricting use of a landowner's tidal marshlands were unreasonable and confiscatory).

carte blanche to prohibit certain uses in order to promote the "public good" and preserve the environment.[39]

In *Just v. Marinette County*,[40] the Wisconsin Supreme Court upheld an ordinance prohibiting the filling of wetlands. The Court stated there was no taking because the regulation attempted only to maintain the "natural character" of the land and did not institute regulations that would drastically change conditions in the area.[41] This is analogous to the facts in *Lucas*. The South Carolina Coastal Council had attempted to maintain the natural character of the South Carolina shoreline by prohibiting Lucas from building on his lots. In so doing, however, it stripped Lucas of much of the "bundle of rights"[42] that he assumed he had purchased with the land.

Similarly, in *Claridge v. New Hampshire Wetlands Board*,[43] the New Hampshire Supreme Court upheld a trial court's decision that a landowner could not place fill on his property because the property was "part of a valuable ecological resource and that filling would do 'irreparable damage to an already dangerously diminished and irreplaceable natural resource.' "[44] The court further held that "public policy of the State has recognized the importance of these wetlands, and strong regulations to protect wetlands have been enacted. The regulations call for some sacrifices from all, in that land otherwise ideally situated for private development is effectively rendered unavailable for that purpose."[45] This is apposite to what happened in *Lucas*; the property concerned was rendered unavailable for private development because of an onerous regulation. Through that regulation, the South Carolina Legislature stripped Lucas of his fundamental rights. Although environmental concerns and wildlife preservation are important and deserve careful consideration, individual private property owners cannot be asked to bear the burden of supporting the environmental movement as they were in *Just* and *Claridge*.[46]

It should make little difference whether a regulation is aimed at preserving the status quo[47] or whether it seeks to prevent a property

39. *See infra* notes 43-47 and accompanying text.
40. 201 N.W.2d 761 (Wis. 1972).
41. *Id.* at 768.
42. A property owner often is considered to possess a "bundle of rights" in the property. The Court has held that when only one "strand" of this bundle is affected, there is no taking. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). *Accord Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).
43. 485 A.2d 287 (N.H. 1984).
44. *Id.* at 289.
45. *Id.* at 292.
46. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960)(holding that requiring just compensation for takings is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").
47. *See* Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

owner from continuing to use his land in what a legislature or a court considers an inappropriate manner.[48] In both cases the regulation is depriving a property owner of his rights, a deprivation for which he should be compensated. Granted, the argument against compensation in the former case may be somewhat stronger because the landowner has not begun to exercise his rights, and the regulation, according to some, takes nothing away from him. The regulation, however, does prevent him from ever exercising rights that were expressly or impliedly attached to the property that he purchased.[49] He has, in this sense, lost something of value and should be fairly compensated.

1. *The Public Nuisance Exception*

Although criticized by the dissenting justices for its line of reasoning,[50] the *Lucas* majority, through Justice Scalia, stated that compensation should be given if the use for which Lucas had purchased his property did not conflict with South Carolina's traditional property and nuisance laws.[51] In other words, if building a house on the beachfront property was something that traditionally would not have been prohibited (either by existing property law or as a nuisance), Lucas should be compensated for the loss of all economically beneficial use of his property caused by a regulation that he could not or should not have anticipated when he purchased the property.

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[52]

The soundness of such reasoning is self-evident. Suppose, for example, J purchases Yellowacre, a lakefront property in Minnesota that is surrounded by resorts. If J purchased the property for the purpose of operating a smelting plant, there is little doubt that county regulations that prohibit such a business in a resort area should not be perceived as effecting a taking. J should have realized that such an operation in an exclusive resort area would likely be perceived as a nuisance[53] and most certainly would be prohibited by zoning regulations. J would have very little support for an argument that he should

48. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915)(upholding an ordinance that prohibited a property owner from continuing to operate a brickyard in a residential area and finding no taking).
49. *See supra* note 42 and accompanying text.
50. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2904, 2919 (1992)(Blackmun, J., and Stevens, J., dissenting).
51. *Id.* at 2900 (Scalia, J., writing for the majority).
52. *Id.* at 2899.
53. *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970)(holding that dirt, smoke and vibration from a neighboring cement plant constituted a nuisance).

be able to use Yellowacre in any way he chooses merely because he owns the land.

Suppose, however, that after J purchased Yellowacre for $3 million, the county zoning board, in an effort "to preserve the county's wilderness areas," passes a regulation that prohibits J from operating a resort or building any structures on his property. Clearly the right to operate a resort was a right that "inhere[s] in the title"[54] of Yellowacre and one that J expected he could exercise. By enacting a regulation that prohibits J from operating any type of resort, the county deprives him of all economically beneficial use of his property. There is no conceivable way that J can begin to recover his investment. He will not have the anticipated revenues from vacationers using the resort, and J clearly will not find a buyer willing to pay $3 million for a parcel of land that cannot be used. If J's resort would have caused no nuisance-like harm, the regulation should either be lifted or he should be compensated.

The *Lucas* Court's decision to allow a public nuisance exception in determining whether there has been a taking is not a novel idea.[55] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[56] the public nuisance doctrine played a major role in the Court's decision to uphold a regulation that required fifty percent of the coal beneath certain structures to be kept in place to provide surface support. The *Keystone* Court stated that just because "private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance."[57] The Court further explained, "The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."[58]

In using a public nuisance test, the Court ensures that the only restrictions that deprive a property owner of all economically beneficial or productive use of his land will be those that a reasonable person could have or should have foreseen, which is a rational way to consider

54. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).

55. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

56. 480 U.S. 470 (1987).

57. *Id.* at 488.

58. *Id.* at 491 n.20. *See also* Nassr v. Commonwealth, 477 N.E.2d 987 (Mass. 1985)(holding there was not a taking where the government directed the cleanup of a hazardous waste operation which was declared a nuisance); Kuban v. McGimsey, 605 P.2d 623 (Nev. 1980)(holding that an ordinance prohibiting prostitution did not work a taking of a brothel). This reasoning and analysis is consistent with the often-quoted maxim, "*Sic utere tuo ut alienum non laedas*" (use your own property in such manner as not to injure that of another).

a takings question. While all property owners take title to land realizing that some regulation is inevitable,[59] such regulation should be foreseeable in order to avoid being considered a taking.[60]

2. Public Nuisance vs. Noxious Use

The public nuisance exception adopted by the *Lucas* Court majority[61] is arguably similar to the test used by the South Carolina Supreme Court.[62] The South Carolina Supreme Court analogized the Beachfront Management Act to ordinances that prohibit noxious uses[63] or uses that harm the public.[64] In so doing, the South Carolina Supreme Court stated that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm."[65] Traditionally, if a regulation was intended to prevent a public harm, no compensation was required.[66] If, however, the regulation's overriding purpose was to effect a public benefit, compensation was in order.[67]

The South Carolina Supreme Court focused on the prevention of harm aspect of the noxious use test. This type of analysis, the United States Supreme Court held, was vulnerable to the varied interpretations of individual justices.[68] In reversing the South Carolina Supreme Court, the Supreme Court's majority strongly criticized the harmful or noxious use analysis used by various courts for many years.

> [T]he distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation.[69]

The foregoing passage exposes the blatant flaw in the South Caro-

59. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.")
60. *See* Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 195-96 (1974).
61. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).
62. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).
63. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915)(upholding ordinance prohibiting manufacture of bricks in a residential area).
64. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928)(holding that it is not a taking for government to destroy diseased cedar trees in order to prevent harm to apple orchards); Mugler v. Kansas, 123 U.S. 623 (1887)(upholding regulation against manufacture and sale of intoxicating liquor because of harm to the public).
65. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).
66. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928).
67. *See, e.g.*, Bartlett v. Zoning Commission of Old Lyme, 282 A.2d 907 (Conn. 1971).
68. *See infra* note 76 and accompanying text.
69. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992).

lina Supreme Court's noxious use reasoning: It is not possible, in most cases, to distinguish between a regulation that prevents a harmful use and one that confers a public benefit.[70] Unfortunately, this gray area has allowed courts to uphold many oppressive regulations, without compensation, in the name of preventing "public harm."[71]

There is no clear answer to whether South Carolina's Beachfront Management Act's central purpose was to prevent harm or to benefit the public.[72] The South Carolina Supreme Court majority was convinced that the Act clearly was intended to prevent a harm.[73] A close examination of the Act, however, reveals that several of the Act's stated purposes refer to benefits that the public would receive from prohibiting Lucas from building on his property rather than to perceived harms that such construction would cause.

Section 48-39-250 of the Act provides, in pertinent part:

> (1) The beach/dune system along the coast of South Carolina . . . serves the following functions:
>
> . . .
>
> (b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local revenues;
>
> . . .
>
> (d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.[74]

Granted, the Act also was meant to prevent possible harms that could result from erosion along the coastline.[75] But where should one draw the line? If a regulation is equally intended to prevent harm and to benefit the public, should the property owner be compensated for half of his losses? If would seem unfair to give him nothing. If a legislature were allowed to avoid compensation as long as *some* public harm was purportedly averted by a regulation, the government would almost always be able to regulate whatever it wanted without paying a dime. A clever legislator or special interest group would merely have to ensure that some portion of the regulation addressed a "dangerous public harm" (real or imagined) that needs to be prevented. Such a

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70. *Id. See also infra* note 76 and accompanying text.
71. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).
72. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898-99, 906 (S.C. 1991)(indicating disagreement between the majority and dissenting justices as to whether the Act's main purpose was to prevent a harm or to benefit the public), *rev'd*, 112 S. Ct. 2886 (1992).
73. *Id.* at 898-99.
74. 1988 Act. No. 634 § 1, 1988 S.C. Acts 5130, 5130 (current version at S.C. CODE ANN. § 48-39-250 (Supp. 1992)).
75. *Id.*

system is unacceptable. As the Supreme Court recognized, the noxious-use/prevention of harm doctrines are too malleable.

> Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing use must yield.[76]

There must be some benchmark against which potential investors or property owners can measure their potential rights in the property they own or intend to purchase. The public nuisance exception provides such a benchmark, as under this approach, property owners will know where they stand. They will realize that they cannot use their land in ways that cause substantial interference with others' property rights or the public's rights in general and are either (1) intentional and unreasonable or (2) unintentional but negligent, reckless or resulting from an abnormally dangerous activity.[77] There must be some substantial interest that the government is trying to protect before it is allowed to strip a landowner of his fundamental property rights.

> A law or decree with such an effect must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[78]

If private property rights are subject to ad hoc, random decisions,[79] a landowner has little assurance that his rights in the property will not be eroded. Basing takings decisions on what "inhere[s] in the title itself"[80] will grant such assurance to property owners and potential investors—if not completely, clearly more than a noxious-use test as used by the South Carolina Supreme Court.[81]

B. Extending the Investment-Backed Expectations Test

Establishing deprivation of all economically viable use as a per se taking,[82] while limiting the test by the nuisance exception, is a logical extension of a doctrine that began as merely one of several factors the Court considered in takings cases.[83] Consideration of the investment-backed expectations of a landowner has played a role in takings jurisprudence,[84] as has the diminution in value test.[85] As only one of sev-

76. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2898 (1992).
77. RESTATEMENT (SECOND) OF TORTS § 822 (1979).
78. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).
79. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).
80. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).
81. *See supra* notes 62-64 and accompanying text.
82. *See supra* note 30.
83. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
84. *Id.*
85. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

eral factors, however, considerations of the landowner's investment and expected return were too easily discounted.[86]

Recognizing deprivation of all economically beneficial use as a per se taking means that property owners will have more assurance that their investments and expectations will be protected. Property owners will be able to gauge the feasibility of using their property in a particular way—applying the nuisance standard[87]—before expending large amounts of time and money in pursuit of an endeavor, only to have the government put the project on hold with a restrictive regulation. The new rule, however, is one step short of being solidly in favor of property owners. The Court stated that deprivation of "all" economically viable use constitutes a per se taking,[88] which leaves a void for the Court to fill in future takings cases.

The Eleventh Circuit has already recognized this void. In *Reahard v. Lee County*,[89] the court stated that the *Lucas* Court "left open how the categorical takings rule . . . applies to situations in which a part of the landowner's property is rendered unusable by a regulation."[90] The new per se takings rule, in its present form, will not guarantee that property owners will be able to use their property in any way they choose. Indeed, regulations still may prohibit the most profitable uses and not be deemed takings because they afford the property owner "some" use of his land.[91] But the test is a move in the right direction. The Court indicated that it might consider granting partial compensation to a property owner who loses "some" of the economically beneficial use of his property.[92] Allowing such a recovery is necessary to strengthen individual owners' property rights against legislative prohibitions.

Clearly, the Court's decision will grant more leverage to property owners who are faced with regulations that the legislature or some special-interest group think are necessary. Applying the Court's new per se takings test, with its public nuisance exception, does not usurp a state's authority in protecting the public's interest. It merely provides a check on that authority and keeps the Legislature from going

86. Although the Court in *Pennsylvania Coal* recognized that diminution in value should be considered, it held that a land-use regulation will not result in a taking merely because of diminution in value alone. *Id.* at 413. *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)(holding that a seventy-five percent diminution in value resulting from a zoning law was not a taking).

87. *See supra* note 51 and accompanying text.

88. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992).

89. 968 F.2d 1131 (11th Cir. 1992).

90. *Id.* at 1134 n.5.

91. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2919 (1992)(Stevens, J., dissenting).

92. *Id.* at 2895 n.8.

overboard.[93]

Government still will be able to regulate brickyards, slaughterhouses, and hazardous waste dumps that are considered nuisances in certain locations. It will not, however, be able to deprive a property owner of all economically viable use of his land—provided no nuisance is involved—through legislation that some lobbyist thinks is in his or her particular group's best interest.

This new test will have positive results for all involved. Certainly the property owner wins; he now has some idea of where he stands and what activities he can and cannot conduct on his property. Government also wins because it retains the power to regulate private property owners so that they do not interfere with or harm their neighbor's interests or the general public's interest.[94] There must be some limit to the legislature's authority to regulate. To echo Justice Holmes, if the legislature is allowed to regulate with no restraint, it will succumb to "the natural tendency of human nature . . . to extend the qualification more and more until at last private property disappears."[95]

IV. CONCLUSION

At times during the past century, it seemed doubtful that the Fifth Amendment's Takings Clause meant anything to the courts or to government in general in the area of land-use regulations. Under the guise of preventing "public harms," local and state governments passed regulations that deprived property owners of their fundamental rights.

The democratic principles upon which our government was founded were meant to allow people to control the government, not to allow legislatures to strip citizens of fundamental rights through uncontrolled regulation. Granted, some regulation is necessary, but when such regulation involves taking away fundamental property rights, something must be given back in return.

In establishing a new per se takings rule premised on preventing deprivation of all economically beneficial uses and in establishing a public nuisance standard for evaluating regulations, the Supreme Court has taken a positive step toward ensuring that oppressive regulations that strip property owners of all of their rights will not be enforced without compensation. If the government wants to regulate property use for no reason other than effecting a benefit for the public, it should be willing to pay for that benefit.

This new per se takings rule will not allow property owners to use

93. *See supra* text accompanying note 37.
94. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900-01 (1992).
95. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

their land in harmful ways that benefit only themselves. The public nuisance exception ensures that will not happen.[96] If anything, the rule will benefit the public. As a result of assurances gained through *Lucas*, land developers should feel more confident that their rights will be protected from oppressive regulations and may respond to these assurances with new developments and projects that have positive economic results for many.

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96. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900-01 (1992).